OGC 77-2821

3 May 1977

MEMORANDUM FOR : Director of Central Intelligence

VIA : Deputy Director of Central Intelligence
Deputy to the DCI for the Intelligence Community

FROM : Anthony A. Lapham
General Counsel

SUBJECT : Department of Defense Objections to Latest Draft of Electronic Surveillance Bill

1. Action Requested: None; for information only. This memorandum summarizes the positions advocated by the Secretary of Defense with respect to the "final" draft electronic surveillance bill prepared by the Department of Justice, in a memorandum which has been sent to President Carter today. A copy of the Secretary's memorandum in draft is attached.

2. Background: The final draft of the electronic surveillance bill was prepared by the Department of Justice and distributed to members of the Attorney General's subcommittee under Part 1 of PRM-NSC-11, including me as your representative on that subcommittee, for final review and coordination on 17 April. This draft was supposed to reflect the major policy decisions made at the SCC meeting of 14 April which you attended and Presidential resolution of the two major policy issues left unresolved at that meeting, i.e., that warrants should be required for all electronic surveillance activities conducted within the United States and that the current bill should not cover U.S. persons abroad. Further, the draft was to reflect decisions made at a subsequent session of the Attorney General's subcommittee and another between Justice and the Vice President's staff. It was intended that the draft bill would be submitted to its intended sponsors, including Senators Kennedy and Bayh, early this week. On 29 April, DoD's General Counsel submitted about 20 proposed changes to which Justice replied on 30 April, adopting some and rejecting others.

3. The draft memorandum to the President from the Secretary of Defense addresses these unresolved problems. The specific problems and the recommended solutions, while individually meritorious in varying degrees from the perspective of the intelligence community, are extremely technical. It is the Secretary's contention, however, that although the points he raises are

technical, taken together they result in a bill which has serious defects in two respects, to wit: (1) it does not provide adequate protection for sensitive security sources and information, and (2) it requires security agencies to meet disablingly complex standards before they may engage in communications and signals intelligence activities.

4. Under category (1), the Secretary is concerned with (a) the standard of judicial review of Executive Branch certifications that the information sought is foreign intelligence information, (b) the ability of the court to request backup information, including earlier transcripts, to support surveillance applications, (c) the apparent blanket authorization to use the product of surveillance for law enforcement purposes without reference to national security interests, (d) the standards for disclosure in unrelated criminal court proceedings, and (e) the requirement that the identities of reviewing judges be publicly disclosed. Under category (2), the Secretary is concerned with (a) the difference in treatment accorded entities openly acknowledged as directed and controlled by foreign powers, e.g. business firms, as opposed to those firms whose direction and control is covert, and (b) the required showing that the information sought cannot feasibly be obtained by normal investigation techniques. See the attached memorandum for detailed arguments of the Secretary on these issues.

5. The pros and cons of whether you should support the Secretary's objections and recommended solutions are as follows:

Pros - there is some merit in the recommended solutions and they are consistent with the policy guidance of the SCC and the President

- each of the problems relates to policy considerations and their resolution is not dictated by legal requirements

- in view of the likelihood that the language of the bill will probably be modified in the Congress, there is something to be said for taking a conservative stance on these issues at the outset of the legislative process.

Cons - the cumulative importance of the recommended solutions appear to be somewhat overstated by the Secretary--it is highly debatable whether they are of sufficient significance to require Presidential consideration

- there is some political risk that the proposed changes would be unacceptable to sponsors whose support is essential to the legislation

- taking these issues to the President at this late date could, and probably would, be misconstrued as intelligence community or Administration opposition to this legislation or as delaying tactics

6. Recommendation: I recommend that this matter not be taken up with the President, but that further attempts be made to resolve these issues at the staff level. As the existing Attorney General's subcommittee is an appropriate forum for such consideration, I have suggested that a meeting of the subcommittee be held tomorrow and have obtained the concurrence of DoD and Justice representatives. In the event, however, that this meeting is unsuccessful, a meeting between you, Secretary Brown and the Attorney General may be in order.

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Anthony A. Lapham

Attachment

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REMARKS:

Due to the expeditious nature of the attached memorandum drop copies have been sent on to the DDCI and the D/DCI/IC.

FROM: Anthony A. Lapham, Gen. Counsel		
ROOM NO. 7D07	BUILDING HQS	EXTENSION

FORM NO. 241 REPLACES FORM 36-8 WHICH MAY BE USED. (47)

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FOR REVIEW & COMMENT AS APPROPRIATE.

D/ [redacted]
Executive Secretary
3 May 77
Date

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THE SECRETARY OF DEFENSE
WASHINGTON, D. C. 20301

2May1977

MEMORANDUM FOR THE PRESIDENT

SUBJECT: Proposed Foreign Intelligence Surveillance Bill

You will recall that, in connection with your decision to seek legislation requiring warrants for foreign intelligence surveillance, you indicated that the Department of Defense should participate in drafting the provisions. On April 28 the Department of Justice sent a draft of the legislative language to my General Counsel. On April 29 the latter transmitted about twenty proposed changes--twelve of them substantive--to which the Department of Justice replied on April 30, adopting some and rejecting others.

The Department of Justice draft bill, as it stands after this exchange, has limited but serious defects in two respects: (1) it does not provide adequate protection for sensitive security sources and information; and (2) it requires the security agencies to meet disablingly complex standards before they may engage in communications and signals intelligence activities.

I have suggested amendments that would cure these defects without any adverse impact on the civil rights of United States citizens. As I understand his position, the Attorney General agrees that the amendments I have proposed are legally proper and administratively feasible. His reservation is that, if made, they might cause the loss of some of the proposed sponsors of the bill or some votes in committee or on the floor. I believe these matters are sufficiently important to justify some political risk at the outset of the legislative process. The activities affected by this legislation are crucial to the obtaining of adequate intelligence for you.

My concerns are as follows:

(1) At five important points, the draft bill creates situations that require sensitive security information to be exposed, and thus increases the risk that it will be compromised:

First: As the bill is drafted, the court will review the certificates by the intelligence agency that must accompany each application for a warrant (to the effect that the information sought is foreign intelligence information) using an "arbitrary and capricious" standard. That standard permits and encourages the court to require more disclosure than would be the case under the narrower "clearly erroneous" standard which you approved.

Second: The bill contains two sections specifically permitting the court to ask for back-up information; one of these goes so far as to require the intelligence agency to provide complete transcripts from earlier electronic surveillance activities when it applies for an extention of a prior warrant.

Third: The standard established for disclosure in connection with law enforcement activities does not contain the necessary requirement for weighing the adverse effect of disclosure on national security.

Fourth: The standard for disclosure in unrelated criminal court proceedings is not stringent enough to protect the national security.

Fifth: The bill requires public disclosure of the identity of the judges to whom foreign intelligence warrant-approval duties will be assigned. This is unnecessary and increases the risk they will become targets for foreign intelligence-gathering activities.

(2) At two points the bill creates what I regard to be unrealistic roadblocks to the gathering of legitimate foreign intelligence information:

First: The bill does not permit a warrant for more than 90 days against entities that are both directed and controlled by foreign governments, unless the security agencies can demonstrate that these entities are "openly acknowledged" by the foreign government that directs and controls them. Such open acknowledgment is seldom the case.

Second: The bill does not permit a warrant to be obtained unless the foreign intelligence information that is sought cannot feasibly (as contrasted to "reasonably") be obtained by other methods. A standard of reasonableness is, it seems to me, much more appropriate.

I believe that changes to correct these deficiencies can be made in a manner consistent with your decisions on PRM-11/1. Moreover, I strongly believe that the Administration bill should contain adequate safeguards in these respects. The Department of Defense and the security agencies, who are charged with obtaining this information for you from the communications of foreign powers, are willing to assist in explaining these concerns to the Congress in an effort to get a satisfactory, workable bill enacted. My views and proposed changes are set out more fully in the attachment hereto.

Harold Brown

cc: The Vice President
The Secretary of State
The Attorney General
The Director of Central Intelligence

ATTACHMENT

Some of the principal additional details with respect to the Department of Defense objections and proposed changes to the Department of Justice draft bill on foreign intelligence surveillance are set out below.

A. Protection of Security

1. The standard used to review the certification by the Executive Branch: Under the statutory plan, the Executive Branch will certify that the information sought is foreign intelligence information, that the information cannot be obtained by other means, and that the surveillance is required for a certain period of time (up to one year in the case of surveillance of foreign powers). Under the policy guidance issued by you, the certification with respect to surveillances of U.S. persons was to be reviewed by a judge who could refuse a warrant only if the certificate was "clearly erroneous" -- that is, only if from the face of the certification the judge could determine that a mistake had been made. The purpose in choosing the "clearly erroneous" standard, after considerable debate by the PRM-11 subcommittee, was to limit, to the extent possible, substantive review by the court of matters within the certification.

The current draft of the bill uses an "arbitrary and capricious" standard instead. That is a major change, which in effect forces the judge into a detailed analysis of the facts and gives wider discretion to deny the warrant. This is an extension of the protection contained in S 3197 (the Kennedy bill) last year which permitted no substantive review of the certification under any standard. The "arbitrary and capricious" standard permits a judge to "second-guess" the Executive Branch as to what is foreign intelligence information, what alternatives are available to get the information, and how long the collection of the information will take. I believe that to be unwise. It also opens the door to the disclosure of a great deal of sensitive security information because, under an "arbitrary and capricious" standard, a judge can deny the warrant if additional information is not provided, and that denial would be upheld on appeal preventing the agency from gathering information from the target designated in the application. Under the "clearly erroneous" standard the judge is limited to the information presented in the certification and has no basis on which to request more.

2. Statutory authority for judges to request additional information: A related problem is raised by two provisions in the current draft that specifically authorize judges to require the security agencies to submit additional information before approving the application for a warrant. I am concerned that the inclusion of these provisions undercuts the intent of the bill not to permit a judge to go behind the certification of the Executive Branch except in a very limited way. I am even more concerned about the requirement that on renewal applications, after the original warrant has run out, the security agencies could be required to disclose the information in the transcripts obtained from surveillance under the original warrant.

3. Standard for disclosure of foreign intelligence information for law enforcement purposes: The current draft of the bill permits disclosure of the information acquired by the security agencies for law enforcement purposes. I believe it very important to add the qualification that such a disclosure be made only if national security interests would not thereby be jeopardized. There is no difference between the Attorney General's position and my position on the underlying policy. We differ only on the need for express statutory recognition that national security interest may, in some instances, take precedence over law enforcement interests. I believe that the policy declarations of this bill with respect to law enforcement uses of foreign intelligence information could be misinterpreted without such an express authorization.

4. Standard for disclosure of foreign intelligence information in court proceedings: Any defendant in any criminal case is entitled to make a motion demanding that the government canvass all agencies to determine if any of the defendant's communications have been intercepted, whether related to his pending case or not. When a demand for disclosure is made, the judge has to determine whether the communications at issue were obtained unlawfully. If they were, then they must be disclosed. If they were not, no disclosure is necessary. The problem arises because many judges have decided that the communications must be disclosed for the purpose of making the determination whether the surveillance was unlawful.

It is appropriate in this bill to include a basic protection against this kind of disclosure because the bill also requires that all foreign intelligence surveillance be conducted pursuant to court order. There should be only a very limited number of cases where there is any need for a judge to disclose to the defendant the contents of the communication in order to make the determination whether the court order permitting that particular electronic surveillance was properly entered. The standard in the current draft is not sufficient to limit unnecessary disclosure. It provides:

> "The court may disclose to the aggrieved person portions of the application, order, or transcript only in compelling situations where the harm to the national security is outweighed by the requirements of due process."

That standard puts the burden on the government to demonstrate harm to the national security (which may require the disclosure of even more sensitive foreign intelligence information) and constructs a balancing process weighted in favor of disclosure. I have proposed an alternative.

> "In making this determination, it shall be presumed that there would be substantial harm to the national security if any disclosure were made of any portion of the application,

order, or transcript, and the court may not disclose to any person claiming to be aggrieved any portion of such documents except under compelling circumstances where the substantial harm to the national security is outweighed by the most fundamental requirements of due process."

5. Public designation of the seven-judge panel and special review court: The Chief Justice of the United States will designate the judges to serve on the seven-judge panel that will entertain requests for warrants and the three-judge panel that will review cases where the request for a warrant is denied. The draft bill specifically provides that these judges be publicly designated. I have expressed to you before my substantial concern that placing the responsibility on a limited number of judges for approving all communications and signals intelligence-gathering operations within the United States will make these judges possible targets for the intelligence activities of foreign powers. I see no need to enhance this possibility by making a public designation of these panels. There is no additional protection for United States persons inherent in making public the names of these judges unless one believes that the Chief Justice will not exercise his selection responsibilities fairly. The names of the judges would be available to Congress should there arise an occasion to exercise oversight responsibility with respect to the Chief Justice's selections.

B. Substantive Standards to Be Met in Obtaining a Warrant

The draft bill sets out in detail the standards that the security agencies must meet in order to support an application for a warrant permitting them to conduct electronic surveillance. These standards in general appear to be workable. I have two important reservations, however, where the standards are unrealistically stringent and would unnecessarily restrict the collection of foreign intelligence information without offering any additional protection for the civil rights of United States citizens.

1. Entities directed and controlled by foreign governments: The current draft includes in the definition of "foreign power" entities that are directed and controlled by foreign governments. It divides these entities into two categories: those "openly acknowledged" by foreign governments to be directed and controlled by them, and those that are in fact so directed and controlled but not openly acknowledged. A one-year warrant and limited certification would be permitted only with respect to the "openly acknowledged" category. The "clandestine" category could be intercepted only under a 90-day warrant and with a more extensive factually-oriented certification as to the basis for the assertions that the information sought is foreign intelligence information and that the information cannot be obtained by other means.

I believe this formulation to be too restrictive. The security agencies will be required to demonstrate that an entity is both directed and controlled before it will be permitted to take advantage of the special year-long warrant. That standard is very stringent since "directed" requires a separate showing from "controlled." Entities that are in fact directed and controlled by a foreign government are extensions of that government and should not receive additional protection against electronic surveillance.

2. Other alternative means of obtaining the foreign intelligence information: Under the current draft of the bill, the application for a court order must include a certification

> "that such information cannot feasibly be obtained by normal investigative techniques."

I am concerned about this requirement because, if strictly construed, it means that there is no way to obtain the information by other means. I am also concerned because the phrase "normal investigative techniques" includes a broad range of activities and what is "normal" in one kind of an investigation may not be "normal" in another. I think that a better, more understandable, formulation would be

> "that such information cannot reasonably be attained by other less intrusive investigatory techniques."

I understand that the current political climate and the commitment of your Administration to limiting electronic surveillance to proper uses require this bill to include all necessary safeguards of the civil rights of our citizens. The points I raise now are essentially technical ones because they do not impinge significantly on that concern. I want to be careful not to limit the foreign intelligence information available to you, when obtained from legitimate targets, and I believe that the substantial credibility of your Administration can overcome any opposition to the changes I propose that may have arisen in the past.